

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PHILIP L. BOWERS and ALEDA G. BOWERS,

Plaintiffs-Counterdefendants-  
Appellants, Cross-Appellees,

v

JOHN A. SHORTER,

Defendant-Counterplaintiff-Cross-  
Plaintiff, Cross-Defendant,

and

KEY BANK, f/k/a SOCIETY NATIONAL BANK  
INDIANA, f/k/a AMERITRUST NATIONAL  
BANK, f/k/a FIRST NATIONAL BANK  
ELKHART and NATIONSBANC MORTGAGE  
CORPORATION,

Defendants-Cross-Plaintiffs-  
Appellees, Cross-Appellants,

and

JOHN D. RIGGS and NANETTE K. RIGGS,

Defendants-Counterplaintiffs-  
Cross-Plaintiffs-Appellees.

UNPUBLISHED

April 27, 2001

No. 221617

Cass Circuit Court

LC No. 97-000037-CH

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Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants Key Bank and NationsBanc Mortgage Corporation and dismissing the claims against defendants John D. Riggs and Nanette K. Riggs. Plaintiffs also challenge the denial of leave to amend their complaint. Defendants Key Bank and NationsBanc cross-appeal the dismissal of their cross-claims. We affirm

Plaintiffs entered an agreement to purchase property from defendant John A. Shorter pursuant to a land contract. The property was subject to a mortgage held by Key Bank. NationsBanc first acted as servicing agent for Key Bank on the mortgage, and then acquired the mortgage outright. The mortgage required that liability insurance be maintained on the property, naming the mortgagor as a loss payee, and that the mortgagor be provided with proof of the mortgage. Plaintiffs did not assume the mortgage, but rather made payments into a collection account from which payments were made in Shorter's name on the mortgage. The only signature appearing on the agreement creating the collection account is that of Shorter, affixed by his brother Terry Shorter pursuant to a power of attorney.

After the land contract was signed, Shorter ceased to regard himself as the owner of the property. Plaintiffs failed to read the mortgage and, consequently, the obligation to provide insurance naming the mortgagor as a loss payee and to give the mortgagor a copy of the policy was overlooked. Key Bank, and subsequently NationsBanc, obtained insurance on the property and debited the collection account (as the source of mortgage payments) for the insurance premiums as permitted by the mortgage. A dual default on the mortgage thereafter occurred, as they were insufficient funds to cover the payments due, and the failure to maintain insurance in the form required by the mortgage was itself a default.

Defendant NationsBanc then took steps to foreclose on the property by advertisement as authorized by MCL 600.3201 *et seq.*; MSA 27A.3201 *et seq.* It sent notices to Shorter, placed an advertisement in the local newspaper giving notice of the foreclosure, recorded the assignment of the mortgage to it, and contacted law enforcement officials to post a copy of the foreclosure notice on the property as required by MCL 600.3208; MSA 27A.3208, which requires that "a true copy [of the notice of foreclosure] shall be posted in a conspicuous place upon any part of the premises described in the statute."

Following the posting, foreclosure occurred and the property was sold at auction. Defendants John D. and Nanette K. Riggs bought the property at the foreclosure sale. Plaintiffs brought this suit seeking to set aside the foreclosure sale and alleging that Shorter had violated his obligations under the land contract, that Shorter and Key Bank had violated the terms of the payment collection agreement, that Key Bank had converted funds (presumably by using them for insurance payments), and that Key Bank and NationsBanc had slandered plaintiffs' title by instituting foreclosure proceedings.<sup>1</sup> Following a hearing on defendants' motion for summary disposition, the trial court granted summary disposition in favor of defendants Key Bank and NationsBanc, and dismissed the claims against the Riggses, finding that there was no genuine issue of material fact regarding the validity of the mortgage foreclosure sale or regarding any of the claims against Key Bank. In light of this finding, the trial court held that the claims against the Riggses could not proceed. The trial court denied plaintiffs' motion to amend the complaint as "futile and untimely." The court subsequently dismissed the cross-claims of Key Bank and NationsBanc, who had sought contribution or indemnity from the other defendants in the event they were found liable.

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<sup>1</sup> Plaintiffs subsequently settled with Shorter, and Shorter is not a party to this appeal.

Plaintiffs first argue that summary disposition was improperly granted because there was a genuine issue of material fact regarding whether a copy of the foreclosure notice was “posted in a conspicuous place upon any part of the premises described in the notice” as required by MCL 600.3208; MSA 27A.3208. This Court reviews a trial court’s decision on a motion for summary disposition under MCR 2.116(C)(10) de novo, viewing the documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 220, 225; 600 NW2d 427 (1999).

Plaintiffs argument is premised on the deposition testimony of the tenants of the property that they did not see the notice. However, Sergeant Ronald Cruzan of the Cass County Sheriff’s Department testified in his deposition that he made great effort to determine the location of the specific residence and that “there was no doubt in my mind that I did post it.” When asked if there was any doubt in his mind that he posted the right house, Cruzen responded, “No sir.” The fact that plaintiffs’ tenants did not see the notice is insufficient to create a genuine issue of material fact in light of Sgt. Cruzan’s absolute testimony that he posted the notice.

Plaintiffs also contend that the trial court abused its discretion by denying their motion to amend their complaint. This Court reviews a trial court’s decision whether to allow amendment of the pleadings under MCR 2.118 for an abuse of discretion. *In the Matter of the Dissolution of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 397; 389 NW2d 99 (1986). In civil cases, an abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance, or the exercise of passion or bias. *Dep’t of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

Here, plaintiffs waited until after summary disposition had been entered against them before filing for leave to amend the complaint. No proposed amended complaint was filed, and there was a great deal of confusion regarding what plaintiffs wanted to plead. To the extent that plaintiffs did suggest a theory, it is clear from a review of the arguments at the hearing on the motion that the trial court did not abuse its discretion in holding that an amendment would have been futile. *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697-698; 588 NW2d 715 (1998).<sup>2</sup>

Affirmed.

/s/ Henry William Saad  
/s/ E. Thomas Fitzgerald  
/s/ Peter D. O’Connell

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<sup>2</sup> In light of our resolution of this matter, the cross-appellants’ appeal is moot.